SUPREME COURT, U.S.

No. 522

Office-Supreme Court, U.S.
SEP 2 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JACKSON L. BOUGHNER,

Petitioner,

vs.

CHARLES F. SCHULZE, Special Agent, Internal Revenue Service, and ARTHUR T. RAYUNEC,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM A. BARNETT
135 S. LaSalle Street
Chicago, Illinois 60603
Attorney for Petitioner

CROWLEY, BARNETT, and GOSCHI
135 S. LaSalle Street
Chicago, Illinois 60603
Of Counsel

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LA review 5-6581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

JACKSON L. BOUGHNER,

Petitioner,

VS.

CHARLES F. SCHULZE, Special Agent, Internal Revenue Service, and ARTHUR T. RAYUNEC,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on July 13, 1965.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals, affirming the order of the United States District Court for the Northern District of Illinois, Eastern Division, was rendered on July 13, 1965, and is not yet reported in the Federal Reporter. The opinion is reported unofficially at 65-2 USTC, ¶ 9549, and it is reprinted as Appendix A hereto, App. 1, *infra*. The District Court Judge rendered an opinion from the bench, a transcript of which is reprinted as Appendix B hereto, App. 6, *infra*. The opinion of the Court of Appeals in *Tillotson* v. *Boughner*, a related case decided the same day as the present case, is reprinted as Appendix C, App. 14, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on July 13, 1965, and a timely petition for rehearing was denied on August 19, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254 (1).

QUESTION PRESENTED

Whether records of a bank employed by an attorney to transmit an anonymous payment of delinquent taxes to Internal Revenue Service on behalf of a taxpayer are clothed with the attorney-client privilege with respect to the taxpayer's identity, where taxpayer's identity is privileged from disclosure by the attorney?

STATEMENT OF THE CASE

On July 27, 1961, petitioner, an attorney specializing in Federal tax matters, transmitted to the District Director of Internal Revenue at Chicago, Illinois, a cashier's check for $215,499.95 drawn on LaSalle National Bank of Chicago. Petitioner's letter of transmittal accompanying the check stated that it represented amounts due from a taxpayer for some past years and that the amount due, with interest to August 1, 1961, had been computed to be $215,499.95. Neither the letter nor the check disclosed the identity of the taxpayer for whom petitioner was acting.

Thereafter, petitioner was summoned by a Special Agent of Internal Revenue Service, who sought to compel petitioner to disclose the identity of the taxpayer. Petitioner declined to disclose the name of the taxpayer, and, in proceedings for enforcement of the summons, the District Court held petitioner in contempt for refusing to answer questions which called for disclosure of the taxpayer's identity. On appeal to the Court of Appeals, that Court held that the identity of the taxpayer was privileged from compelled disclosure under the attorney-client privilege, and the contempt order was reversed. *Tillotson* v. *Boughner*, ... F. 2d ..... (July 13, 1965), Appendix C, *infra*.

On April 7, 1965, while *Tillotson* v. *Boughner* was pending in the Court of Appeals, respondent Schulze, a Special Agent of Internal Revenue Service, petitioned the District Court for enforcement of a summons which directed Arthur T. Rayunec, Auditor of the LaSalle National Bank, to produce ledger sheets and deposit tickets of petitioner's accounts, for the period May 1 to September 30, 1961, and

the check requisition and cashier's check by which petitioner had transmitted the funds to the District Director.

Petitioner was granted leave to intervene, and he filed an intervening answer and cross-claim. These pleadings alleged in substance that the records sought by respondent were privileged against disclosure because they were within the scope of the privilege claimed by petitioner in the *Tillotson* case. They averred that petitioner had acted as attorney for undisclosed clients in the transaction; that the documents sought would or might reveal the identities of the clients; that such information had been revealed to the bank on the condition that it be held in confidence; and that the agency of the bank, and the disclosure of facts incident to that agency, were indispensable to the discharge of petitioner's professional responsibilities to his clients. Petitioner demanded dismissal of the action and injunctive relief against the bank, to preclude it from disclosing the privileged information.

The District Court held no hearing on the issues of fact which arose on the pleadings. On motion of respondent Schulze, it entered an order summarily enforcing the summons and denying the relief demanded by petitioner. Petitioner appealed. The cause was ordered to be heard in the Court of Appeals on an expedited basis, and that Court stayed the order of District Court pending the hearing. After argument, which was consolidated with the argument in the *Tillotson* case, the Court of Appeals affirmed the order of the District Court.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises an Important Question as to the Extent of the Attorney-Client Privilege.

It has never been doubted that confidential communications between client and attorney must be privileged from compelled disclosure. In the companion case of *Tillotson* v. *Boughner* the Court below followed the lead of the Ninth Circuit, holding that under the facts of this case as in *Baird* v. *Koerner* (1960), 279 F. 2d, 623, the identity of the client was privileged. These decisions recognize an exception to the general rule that a client's identity is not privileged. Yet, in the present case, the Court below has placed a limitation on the privilege that tends to defeat the fundamental policy that it is intended to promote. We submit that the issue presented in this petition should be decided by this Court since it involves a question of primary importance to the entire Bar and is of great significance in the administration of justice and of the revenue laws.

The opinion of the Court below distinguishes the position of the bank utilized in this case to transmit a payment of $215,499.95 to the Internal Revenue Service from cases involving the employment of other agents such as an accountant, private detective, or a doctor. (App. A, p. 3.) The Court held that the latter agents are employed by the attorney to aid him in providing legal advice to the client and to facilitate the communication of that advice. The Court states: "It is evident that in the instant case, the bank was not hired by the intervener for any such purpose." (App. A, p. 3.) The petitioner submits that it is

clear from the facts of this case that it was necessary from every viewpoint other than the overly restrictive test adopted by the Court below, to secure the services of a financial institution to effectuate the legal advice that had been given by the attorney to his client.

The attorney in this case was confronted with the obligation of discharging two substantial duties: (1) that of making the Treasury of the United States whole by payment of such monies as may be due and owing, and (2) the protection of his client from possible criminal sanctions which might well be recommended by Special Agents of the Internal Revenue Service. That solving this problem called for the exercise of legal skill and the giving of legal advice was recognized both by the Court below and by the Ninth Circuit. What the Court below seems to say is that while the privilege extends to such persons as the attorney might need to gather and interpret facts as well as to stenographers and interpreters through whom he communicates his advice, it does not encompass anyone whose services are not indispensable to the attorney.

While the petitioner admits that a bank is not an indispensable party in the transmission of almost a quarter of a million dollars from one person to another, he submits that a bank used for such purposes is in no different position than an accountant whose services are utilized in determining the amount of tax and interest due. Certain information had to be made known to the accountant to enable him to make his tax computation. Certain information had to be made known to the bank to enable it to prepare its cashier's check. The Court below has recognized that information imparted to an accountant is within the privilege but draws a distinction in the case of a bank. We submit that while it may be possible, as a

matter of absolute possibility, for the attorney to carry a box of currency about, that it is not possible to do so from any normal, practical viewpoint.

The petitioner urges this Court to consider whether adoption of such an indispensable party rule, when determining the scope and coverage of the attorney-client privilege will best serve the administration of justice. Certainly there can be no public policy against allowing taxpayers to make delinquent tax payments into the Treasury of the United States without risking criminal prosecution. The rationale of this case could easily be extended to other areas so as to cause great uncertainty in this important area of the law.

2. The Decision Below is Contrary to the Clear Implication of Reisman v. Caplin.

The Court of Appeals said in its opinion:

> "When Boughner purchased the cashier's check upon behalf of the anonymous taxpayer, Boughner personally did not acquire any rights concerning the bank's books or its records. The relationship which was established was that of debtor and creditor."

This ground of the decision suggests that a question of privilege may be resolved by determining the ownership of records or of funds on deposit. But the question of privilege is quite distinct from the ownership of any chattels or funds. That question deals with a rule withholding certain information from adverse parties for strong reasons of policy that are entirely independent of property concepts.

In *Reisman* v. *Caplin*, 374 U.S. 440, the Court explicitly recognized that a taxpayer may have an interest in records in the possession of another. That interest is substan-

tial enough to permit him to intervene in an action to prevent disclosure of the information contained in such records to a third party. Such intervention was permitted in this case, but the assertion of privilege was rejected.

We submit that the decision of the Court of Appeals is based in large part on this unduly narrow concept of the extent of the privilege. It is irreconcilably in conflict with the principles for which *Reisman* v. *Caplin* stands, and it creates confusion in this important area of the law. Even more important, it sanctions what we earnestly believe is an unwarranted exercise of its investigative powers by the Internal Revenue Service. We respectfully urge this Court to resolve these important issues.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

WILLIAM A. BARNETT
135 South LaSalle Street
Chicago, Illinois 60603
Counsel for Petitioner.

CROWLEY, BARNETT & GOSCHI
135 South LaSalle Street
Chicago, Illinois 60603
Of Counsel.

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1964—APRIL SESSION, 1965

No. 15157

CHARLES F. SCHULZE, Special Agent, Internal Revenue Service,
Petitioner-Appellee,

v.

ARTHUR T. RAYUNEC, Auditor LaSalle National Bank, Chicago, Illinois,
Rsspondent-Appellee,

JACKSON L. BOUGHNER,
Intervener-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 13, 1965

Before DUFFY, CASTLE and KILEY, *Circuit Judges.*

DUFFY, *Circuit Judge.* This is a companion case to No. 15036, Paul W. Tillotson, Special Agent, *Internal Revenue Service* v. *Jackson L. Boughner,* decided this day. Jackson L. Boughner, the defendant-appellant in No. 15036, is the same person as Jackson L. Boughner designated as intervener-appellant in the instant case.

This is an appeal by intervener-appellant Boughner from an order entered by the District Court on May 10, 1965, directing respondent Arthur T. Rayunec, Auditor of the LaSalle National Bank, to produce certain of the bank's records in compliance with an Internal Revenue Service summons issued to him on February 17, 1965.

On April 7, 1965, a petition was filed in the District Court to enforce an Internal Revenue Service summons which, the petition alleged, was issued in furtherance of Special Agent Schulze's investigation into the tax liability of John Doe, the unknown taxpayer or taxpayers on whose behalf Jackson L. Boughner delivered to the Internal Revenue Service a cashier's check drawn on the LaSalle National Bank in the amount of $215,499.95.

The petition further alleged that the summons sought production of certain bank records which would relate to the depositing of funds for and the requisition and issuance of the above described cashier's check.

On April 9, 1965, petitioner moved for immediate enforcement of the summons and intervener appeared in open court and presented his motion for leave to file a motion to intervene.

On April 28, 1965, the Court overruled the objections of respondent bank and directed compliance with the summons. The order was stayed until May 10, 1965, and intervener was granted leave to file his motion to intervene together with verified pleadings. Briefs were ordered, and the matter was set for hearing on May 10, 1965.

On May 10, 1965, the Court granted the motion to intervene, denied all relief demanded by intervener, and ordered enforcement on May 13, 1965. The instant appeal

was filed on May 12, and the effective date of the order issued herein was stayed pending decision of the instant case, and also of the earlier appeal, No. 15036.

In his answer and crossclaim, the intervener relied on several defenses such as 1) the bank was acting as the agent of intervener, hence the confidential information received by intervener applies to the bank because of the attorney-client privilege; 2) any disclosures would violate the bank's fiduciary duty to its customers; 3) the summons was invalid because it was issued in aid of a criminal investigation, and 4) the summons was invalid because it was issued in aid of an investigation which did not relate to the liability of any known taxpayer.

When Boughner purchased the cashier's check upon behalf of the anonymous taxpayer, Boughner personally did not acquire any rights concerning the bank's books or its records. The relationship which was established was that of debtor and creditor. See *Application of Cole,* 2 Cir., 342 F. 2d 5, 7-8; *Zimmerman* v. *Wilson,* 3 Cir., 105 F. 2d 583, 586; *DeMasters* v. *Arend,* 9 Cir., 313 F. 2d 79, 85 (Fn. 11).

Boughner relies on several cases which hold that when a client makes a confidential communication to an attorney in the presence of persons such as an accountant or private detective or a doctor who has been hired by an attorney because his services are necessary to enable him to give legal advice, such communications are protected by the attorney-client privilege. We think these cases are inapposite.

In such cases, the agent was actually hired by the attorney of the client to facilitate the communication of confidential legal advice. It is evident that in the instant case, the bank was not hired by the intervener for any such purpose.

In *Radiant Burners, Inc.* v. *American Gas Association,* 320 F. 2d 314 (1963), this Court, sitting en banc, considered the attorney-client privilege. We quoted with approval at page 319 the elements necessary for such privilege: "1) Where legal advice of any kind is sought 2) from a professional legal adviser in his capacity as such, 3) the communications relating to that purpose, 4) made in confidence, 5) by the client, 6) are at his instance permanently protected, 7) from disclosure by himself or by the legal adviser, 8) except the protection be waived. 8 Wigmore § 2292."

We have held in *Tillotson* v. *Boughner,* ..... F. 2d ....., in a decision handed down this date, that Boughner, the attorney for an undisclosed client, could refuse to disclose the identity of the person who contacted him for advice as to how to make a voluntary payment with Internal Revenue Service without disclosing the name of the attorney for the taxpayer who consulted him.

We think the instant situation is far different. The LaSalle National Bank was not hired or employed to render any confidential service. The communication, if any, of the client's name was not made in order to enable the bank to aid Boughner in giving any legal advice. In fact, it was not absolutely necessary to disclose the client's name. Boughner could have purchased the cashier's check by currency, although a currency transaction involving $215,000 would, undoubtedly, have been quite unusual.

Although we have held in *Tillotson* v. *Boughner, supra,* that Attorney Boughner may claim attorney-client privilege, and cannot be compelled to divulge the name of the attorney who contacted him for legal advice, we do not think intervener Boughner can clothe the bank records with the same privilege under the facts and circumstances of this case.

We hold that the records of the bank pertaining to the cashier's check which intervener transmitted to Internal Revenue Service on July 27, 1961, are not clothed with the attorney-client privilege.

We have considered the other defenses raised by intervener. We hold them to be without merit under the facts of this case.

The order of the District Court of May 10, 1965, directed to auditor Arthur T. Rayunec, must be affirmed.

We realize that there might be a possibility that the bank records would furnish the lead which would eventually disclose the taxpayer's name. However, we are not here concerned with that possibility. In *Tillotson* v. *Boughner, supra,* as well as in the case at bar, we have decided the claims of attorney-client privilege on the facts involved in each case. We must let the chips fall where they may.

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLES F. SCHULZE,
Special Agent, Internal
Revenue Service,
Petitioner,

vs.

ARTHUR T. RAYUNEC, Auditor,
La Salle National Bank,
Respondent.

No. 65 C 534

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Hon. Edwin A. Robson, one of the Judges of said Court, in his Courtroom in the United States Court House, Chicago, Illinois, on Monday, May 10, 1965 at 10:00 o'clock a.m.

• • •

The answer by the respondent, Bank Auditor Rayunec, states that he appeared pursuant to the summons but advised petitioner, the Special Agent, that he was instructed by Jackson L. Boughner to refuse to turn over his records, and he obeyed his depositor's direction in order to avoid exposing the La Salle National Bank to possible liability should its depositor claim a breach of fiduciary relationship.

The motion for leave to intervene and intervenor's recent memorandum recite many of the facts stated on the April 28th ruling and additionally recite that the Bank is only a nominal party having no substantial rights which

will be adjudicated; that the bank was a necessary agent in effecting the attorney's confidential task and the communication to the Bank was made only for that purpose and is therefore privileged against disclosure.

The intervener denies that the Government is endeavoring to investigate liability for federal tax, but is seeking to make an investigation of possible criminal responsibility of John Doe and a revelation of who John Doe is.

Intervenor maintains that the case of *Perkal* v. *Rayunec* is not res adjudicata here, inasmuch as it did not concern attorney-client privilege, nor is it a correct decision.

Intervener asserts that the instant cause is an attempt to circumvent the Court of Appeals' appellate jurisdiction inasmuch as there is an appeal in 63 C 1522, *Tillotson* v. *Boughner,* in which intervener Boughner was ordered by Judge Will to make the disclosure, which order the Court of Appeals has stayed, pending appeal.

Intervener maintains that the subpoena is void on its face because issued for a purpose not authorized by statute, (not being related to tax liability) to-wit: to obtain evidence of crime for use in a prosecution of John Doe.

The heart of intervener's position is that the documents and information sought to be obtained are privileged against disclosure by the bank because they were disclosed by the intervener, the attorney, in confidence pursuant to a fiduciary duty not to disclose them.

Intervener has filed a cross-claim against the Bank, alleging that if the Bank is not restrained from making the disclosure sought by the Special Agent, the intervener and his clients will sustain irreparable injury by criminal prosecution for violation of the internal revenue laws;

action by the client against the intervener for disclosure of confidential privileged communications; disciplinary action for breach of attorney-client confidence, and intervener's appeal may be rendered moot notwithstanding its merits. Because he allegedly has no adequate remedy at law he seeks a permanent injunction against disclosure by the Bank.

The Court has carefully studied the very pertinent decision of the Ninth Circuit in *Baird* v. *Koerner*, 279 F. 2d 623, but believes it is distinguishable, and if not distinguishable should not be here followed.

In that case the attorney was advised that "the taxpayers are reputable and responsible business men who are now and have always been engaged in a legitimate business, and have not engaged in any unsavory or illegal businesses of any kind." We have no such assurance here.

The court went on to say, at page 631:

> "These cases hold that, under their own facts, the objection of one real client, though valid, must yield to any great interest of that body of clients, the public. There is no question but that it is at times vital to the administration of justice to require disclosure of a client's name.
>
> "We conclude there is no federal body of law that requires the exclusion of the identity of the client from the extent of the attorney-client privilege. We believe it must be assessed on a case-to-case basis depending on the particular facts of each case. We recognize that the policy of full disclosure is a 'more fundamental one' than the policy of the attorney-client privilege; that the latter is not universally regarded as absolute, and is to be strictly limited to the purposes for which it exists. . . ."

However, that Court held that the law of California controlled, and that under that law an attorney could not be compelled to state the names of clients who employed him to voluntarily mail sums of money to the government in payment of undetermined income taxes, unsued on, and with no government audit or investigation into that client's income tax liability pending.

It relied on a California ruling which was based on a statement in 97 C. J. S., Witnesses, Section 283 3, page 803, which stated that:

> "The name of the client will be considered privileged matter where the circumstances of the case are such that the name of the client is material only for the purpose of showing an acknowledgment of guilt on the part of such client of the very offenses on account of which the attorney was employed. . . ."

It is not apparent that intervener was employed here in respect to any criminal offense. From all that here appears he was employed to effect the payment of an anonymous taxpayer's civil liability.

The Court is impressed with the Statement by Wigmore, Section 2313:

> "The identity of the attorney's client or the name of the real party in interest will seldom be a matter communicated in confidence because the procedure of litigation ordinarily presupposes a disclosure of these facts. Furthermore, so far as a client may in fact desire secrecy and may be able to secure action without appearing as a party to the proceedings, it would be improper to sanction such a wish. Every litigant is in justice entitled to know the identity of his opponents. He cannot be obligated to struggle in the dark

against unknown forces. He has by anticipation the right, in later proceedings, if desired, to enforce the legal responsibility of those who may have maliciously sued or prosecuted him or fraudulently evaded his claim. He has as much right to ask the attorney 'Who pays your fees?' as to ask the witness . . . 'Who maintains you during this trial,' upon the analogy of the principle already examined . . ., the privilege cannot be used to evade a client's responsibility for the use of legal process. And if it is necessary for that purpose to make a plain exception to the rule of confidence, then it must be made. . . ."

The Second Circuit, in *Colton* v. *U. S.*, 306 F. 2d 633, at page 637 recently said:

"Thus the identity of a client, or the fact that a given individual has become a client are matters which an attorney normally may not refuse to disclose, . . ."

Corpus Juris Secundum, Witnesses, Section 283, page 802, states:

"The existence of the relation of attorney and client is not a privileged communication. The privilege pertains to the subject matter and not to the fact, of the employment of attorney. . . . So, ordinarily, the identity of the attorney's client, or the name of the real party in interest . . . will not be considered as privileged matter. . . ."

The Second Circuit opinion in the Matter of the Application of Marvin R. Cole, decided February 26, 1965, would seem to indicate the Government's right to investigate a bank's records where none of the records or papers sought belonged to the taxpayer or involved the work product of their attorney. All the records there

sought were the property of the Bank on whom the summons was served. The attorneys were held to have no interest in any of them in the sense that they had a right to any of them.

Judge Will in the *Tillotson* v. *Boughner,* 63 C 1522, opinion, filed February 23, 1965, and presently on appeal stated on page 4:

> "The existence of an attorney-client relationship is not privileged nor is the identity of the parties engaged in such a relationship protected by the privilege. The privilege pertains to communications between the attorney and his client, not to the fact that the two parties are so associated. . . ."

Judge Will further pointed out that it is the client, under Illinois law, who must claim the privilege (*In re Estate of Bussey,* 332 Ill. App. 258). He further states:

> "The precise question of whether an attorney may refuse to divulge the identity of a client has apparently never been considered by the Illinois courts but there is no basis to conclude that in Illinois the client's privilege may be asserted by the attorney as to the identity of the client when it is clear that it may not be so asserted with respect to any other disclosure."

The Government has filed its opposition to the motion for intervention, on the ground that, as cited above a third party cannot challenge the subpoena to the bank, having no legally recognized interest in the bank's records, and also challenging the intervenor's, right to an injunction against the bank's making such a disclosure, there being no diversity of jurisdiction to sustain the matter.

In view of the disposition which the Court makes of this controversy it necessarily follows that intervenor's cross claim seeking an injunction against disclosure by the bank must be denied. While his practical interest in the matter as to which he seeks intervention is evident, his legal right to protest the bank's disclosure cannot be sustained.

Viewing this situation in the abstract, if intervener's position were sustained, all taxpayers might pay their taxes anonymously and evade the Government's right to check the correctness of the amount the taxpayer determined was due. It would result in complete "anarchy" in Government tabulation and bookkeeping of taxes paid or owing, by whom and to what extent.

If a taxpayer wishes to make an anonymous contribution to the Government he should by all means be permitted to do so, but if he intends to fulfil his statutory duty to pay such income tax as is due, he must furnish the Government the implementation of his calculation, and disclose his name and return so the Government can exercise its right to check his figures.

Petitioner for intervention asserts that in his task as an attorney he had to solve the problem of how to transmit to the Government his client's $215,000 tax anonymously to it and of necessity he had to use the implementation of a bank to effect the end, thus making the bank an arm to the privilege.

As the Court views the situation, however, the Government's right is to know who its taxpayer is so that it can itself determine the correctness of the tax.

The statutes give the right to the Government to have discovery as to the books and records of all taxpayers, and the sine qua non to the making of that discovery is to know who the taxpayer is.

The Court concludes that inasmuch as there is but the one narrow issue, the confidential character of a client's name as privileged against disclosure, which it believes is not maintainable against the Government in this tax matter, the petition for intervention is allowed but in view of the disposition on the merits, the cross-claim for injunction is denied.

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

No. 15036 SEPTEMBER TERM 1964 — APRIL SESSION 1965

PAUL W. TILLOTSON, Special Agent, Internal Revenue Service, *Plaintiff-Appellee*, v. JACKSON L. BOUGHNER, *Defendant-Appellant*. } Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 13, 1965

Before DUFFY, CASTLE and KILEY, *Circuit Judges*.

DUFFY, *Circuit Judge*. This is an appeal from an order of the District Court holding defendant Boughner in civil contempt for his refusal to obey an order of the District Court dated February 12, 1965.

Defendant Boughner is an attorney at law specializing in federal tax matters. He was retained for a confidential conference by another attorney, and through that attorney, by an unnamed taxpayer. Boughner was asked

not to divulge the name of the attorney. On July 27, 1961, defendant Boughner delivered to the Internal Revenue Service a cashier's check for $215,499.95 on behalf of the unnamed taxpayer.

On August 27, 1963, Special Agent Tillotson petitioned the United States District Court to enforce an Internal Revenue summons served on defendant Boughner. On December 16, 1963, the District Court entered an order requiring defendant "to give testimony relating to the tax liability of John Doe, the unknown taxpayer, or taxpayers, on whose behalf Jackson L. Boughner delivered to the Internal Revenue Service a cashier's check for $215,499.95, dated July 27, 1961, and drawn on the LaSalle National Bank, Chicago, Illinois." The validity of this order was upheld by this Court, 333 F.2d 515. Defendant petitioned for certiorari, but certiorari was denied.

On December 8, 1964, defendant appeared before plaintiff as required by the order of December 16, 1963. He admitted he was the person who, on July 27, 1961, delivered a cashier's check for $215,499.95 to the Internal Revenue Service. He refused to name the person who brought the matter to him or any other question which might indirectly tend to reveal this name. Defendant asserted the attorney-client privilege.

On January 22, 1965, the United States Attorney filed a motion to advise the Court that its order of December 16, 1963 had not been obeyed. On the same day, plaintiff moved for a rule to show cause why the Court should not enter appropriate sanctions against defendant. On that date, the Court entered a show cause order why the Court should not enter appropriate sanctions due to

defendant's failure to obey the order of December 16, 1963. The show cause order was returnable on February 12, 1965.

Defendant appeared on February 12, 1965, but denied he was in disobedience of the order of December 16, 1963, except as to those questions to which he deemed the attorney-client privilege applied. The District Judge stated he thought defendant had waived the right to claim the attorney-client privilege, but that he would not decide the case on that point. He then issued an order for defendant to appear on that date at 2 p.m. before Special Agent Charles Schulze in a witness room in the United States Courthouse. Later that day, the Court was advised by an Assistant United States Attorney that defendant had refused to respond to questions, asserting the attorney-client privilege. The Court then entered an order finding defendant guilty of civil contempt for refusal to obey the order of February 12, 1965, and directing him to personally pay the sum of $100.00 each day until such time as he should purge himself of contempt by obeying the order.

Defendant's first claim is that the proceeding below deprived him of his right to due process under the law. Defendant claims the Court, in reality, was proceeding under the summary provisions of Rule 42(a), Federal Rules of Criminal Procedure. Defendant points out there was no contempt committed in the presence of the Court, hence that he could only be proceeded against by notice and a hearing with allowance for reasonable time to prepare his defense.

The difference between civil and criminal contempt is well established. A commitment or fine for civil contempt is to coerce the defendant. The sentence for a

criminal contempt is not intended to coerce, but rather as a punishment to vindicate the Court's authority. *Duell* v. *Duell,* DC Cir., 178 F.2d 683, 685.

Defendant, himself an attorney, was also represented by counsel on February 12, 1965. Neither objected to the hearing being held on that date. In fact, counsel was asked by the Court if there were any other reasons why defendant should not be held in contempt, and he replied there were none other than the attorney-client privilege. We hold the defendant was not deprived of his right to due process.

On this appeal, plaintiff argues that defendant could have raised the question of attorney-client privilege in the prior litigation which came before this Court, and that not having done so, he has waived the right to claim such privilege.

On January 15, 1963, the defendant appeared pursuant to the summons and identified himself. He declined to state his profession or to answer this question: "Are you the party who, on or about July 27, 1961, either submitted or had submitted a cashier's check in the amount of $215,499.95 to the Internal Revenue Service, in payment of a taxpayer whose name we do not know?"

Obviously, neither defendant's profession nor the undisputed fact that he had submitted the cashier's check could possibly have involved the attorney-client privilege. The hearing was then terminated by plaintiff who had asked no question to which any attorney-client privilege could have been asserted. Therefore, the only issue before the trial court and before this Court on the previous appeal was the validity of the summons. Our decision was limited to that question. Note in particular Judge Knoch's concurring opinion, 333 F.2d at page 517.

Another reason why the privilege has not been waived is that the privilege is that of the client. Here, the client is not a party to this suit. As stated in 8 Wigmore, Evidence, § 2321—"Under the original theory of the privilege, it was the attorney's, not the client's (§ 2290, supra). But under the modern theory (§ 2291, supra), it is plainly the client's, not the attorney's. This is now never disputed."

In *Schwimmer* v. *United States,* 8 Cir., 232 F.2d 855, 863, the Court said—"The privilege thus is one that exists for the benefit of the client and not the attorney. . . . But the attorney has the duty, upon any attempt to require him to testify or produce documents within the confidence, to make assertion of the privilege, not merely for the benefit of the client, but also as a matter of professional responsibility. . . ."

We hold the defendant Boughner is not foreclosed by operation of the doctrines of waiver, res judicata or otherwise, from raising, on this appeal, the attorney-client privilege.

We now turn to consider whether under the peculiar facts of this case, the attorney-client privilege includes, within its scope, the identity of the client.

There is little doubt but that defendant Boughner planned the transaction in the instant case, including the purchase of the cashier's check, in light of the decision of *Baird* v. *Koerner,* 9 Cir., 279 F. 2d 623 (1960). Baird was a tax lawyer who, like Boughner, had for years been an attorney for the Internal Revenue Service. Baird conferred with certain accountants concerning the income tax of an individual taxpayer. The accountants determined the taxpayer's returns were incorrect and his taxes under-

stated. No investigation was then being made by the government. Taxpayer's attorney came to Baird's office and without disclosing the identity of the taxpayer, delivered to Baird $12,706.85 which had previously been determined as the amount of tax due, plus interest. Baird transmitted to the District Director of Internal Revenue Service at Baltimore a cashier's check for $12,706.85 with a letter very similar to the one used by Boughner in the instant case.

The Court of Appeals for the Ninth Circuit reversed the District Court insofar as that Court had ordered Baird to reveal any information regarding the persons who had employed him. The Court specifically held that an attorney cannot be compelled to divulge the names of clients who employ him to voluntarily mail sums of money to the government in payment of undetermined income taxes, unsued upon, and as to which no government audit or investigation is pending.

The Court stated that the relationship of client and attorney is created and controlled by the laws of the various states; that in determining the nature and extent of the privilege created between a lawyer and his client, federal courts should follow the state law. The Court pointed out that under California law, there was no exception created to the attorney-client privilege.

Other cases such as *Colton* v. *United States,* 2 Cir., 306 F.2d 633, 636, do not apply the state law. However, this point poses no difficulties in the instant case, for the parties herein agreed that Illinois, which has no statute with respect to attorney-client privilege, looks to the common law as do the federal authorities.

The decision in *Baird* v. *Koerner, supra,* has been on the books for almost four years. Various points in the opinion have been cited in court decisions. But the primary holding that the identity of the client, under the facts of that case, was within the attorney-client privilege, has not been criticized. In fact, the decision in *Baird* was expressly followed. See *N.L.R.B.* v. *Harvey,* DC WVa, 235 F. Supp. 580, 583-584 (1964).

In *Colton, supra,* the Court said at page 637: "The authorities are clear that the privilege extends essentially only to the substance of matters communicated to an attorney in professional confidence. Thus the identity of a client, or the fact that a given individual has become a client are matters which an attorney normally may not refuse to disclose, even though the fact of having retained counsel may be used as evidence against the client. . . . To be sure, there may be circumstances under which the identification of a client may amount to the prejudicial disclosure of a confidential communication, as where the substance of a disclosure has already been revealed but not its source."

The disclosure of the identity of the client in the instant case would lead ultimately to disclosure of the taxpayer's motive for seeking legal advice. That this motive of the taxpayer is subject to the privilege is confirmed by Wigmore wherein he states—"A communication as to . . . the ultimate motive of the litigation, is equally protected with others, so far as any policy of privilege is concerned." 8 Wigmore, Evidence, §2313, 609-610.

Considering the peculiar facts in this case, we subscribe to the statement in 97 C.J.S., Witnesses §283, at page 802:

> ". . . [A]n attorney may not be compelled, at the instance of a hostile litigant, to disclose his retainer or

the nature of the transaction to which it related, when such information could be made the basis of a suit against his client."

The order of the District Court dated February 12, 1965, holding defendant Boughner in civil contempt and assessing a penalty of $100.00 per day, is reversed and will be vacated and set aside.

REVERSED

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit